No. 17-1077

IN THE

Supreme Court of the United States

FRANCIS V. LORENZO,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONER

DANIEL A. MCLAUGHLIN
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

CARTER G. PHILLIPS
KWAKU A. AKOWUAH*
KURT A. JOHNSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
kakowuah@sidley.com

Counsel for Amici Curiae

*Counsel of Record

[Additional counsel listed on inside cover]

August 27, 2018

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

IRA D. HAMMERMAN
KEVIN CARROLL
SECURITIES INDUSTRY & FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7382

Counsel for Amicus Curiae *Securities Industry & Financial Markets Association*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	7
I. THE D.C. CIRCUIT ERRED BY FAILING TO INTERPRET RULE 10b-5 IN LIGHT OF ESTABLISHED LIMITATIONS ON SECTION 10(b) LIABILITY	7
A. Section 10(b) Governs The Scope Of Liability Under Rule 10b-5 And Proscribes Only Certain Well-Defined Conduct	7
B. The D.C. Circuit's Approach Would Undermine Section 10(b)'s Limitations On Rule 10b-5 Liability	15
C. The D.C. Circuit's Interpretation Fails To Take Account Of Other Securities Law Provisions That Expressly Address Misuses Of Statements	19
D. The D.C. Circuit's Interpretation Will Harm The Securities Markets	24
II. THE D.C. CIRCUIT FAILED TO SEPARATELY DETERMINE WHETHER LORENZO COMMITTED A PUNISHABLE VIOLATION OF SECTION 17(a)(1)	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Aaron v. *SEC*, 446 U.S. 680 (1980) 3, 8, 28
Cent. Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 4, 11, 12, 14, 22
Chiarella v. *United States*, 445 U.S. 222 (1980) 3, 10, 11, 16, 26
Dirks v. *SEC*, 463 U.S. 646 (1983) 4, 11
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 3, 7, 8, 27
FCC v. *Fox Television Stations, Inc.*, 567 U.S. 239 (2012) 26
Janus Capital Grp., Inc. v. *First Derivative Traders*, 564 U.S. 135 (2011) ..... *passim*
Landry v. *All Am. Assurance Co.*, 688 F.2d 381 (5th Cir. 1982) 27
Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 24
Morrison v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) 15
Musick, Peeler & Garrett v. *Emp'rs Ins. of Wausau*, 508 U.S. 286 (1993) 20, 21
Nat'l Ass'n of Home Builders v. *Defs. of Wildlife*, 551 U.S. 644 (2007) 19
Pinter v. *Dahl*, 486 U.S. 622 (1988) 21, 22
Salman v. *United States*, 137 S. Ct. 420 (2016) 11
Santa Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977) 3, 4, 9, 10, 16
SEC v. *Monarch Funding Corp.*, 192 F.3d 295 (2d Cir. 1999) 27
SEC v. *Quan*, 817 F.3d 583 (8th Cir. 2016) 29
SEC v. *Zandford*, 535 U.S. 813 (2002) 11

TABLE OF AUTHORITIES—continued

Page

Stoneridge Inv. Partners, LLC v. *Sci.-Atlanta, Inc.*, 552 U.S. 148 (2008) 4, 12, 17, 24
Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) 24
United States v. *Chiarella*, 588 F.2d 1358 (2d Cir. 1978) 10
United States v. *Naftalin*, 441 U.S. 768 (1979) 27
United States v. *O'Hagan*, 521 U.S. 642 (1997) 11

STATUTES AND REGULATION

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 23
15 U.S.C. § 77k(a) 22
§ 77*l*(a)(1)–(2) 22
§ 77o(a) 21
§ 77q(a) 27
§ 77q(b) 20
§ 78i 20, 21
§ 78j(b) 4, 9, 27
§ 78r(a) 21
§ 78t(a) 21
§ 78t(e) 17, 21
17 C.F.R. § 240.10b-5 ..... 18, 19

AGENCY DECISION

Flannery, Exchange Act Release No. 3981 (Dec. 15, 2014), *rev'd on other grounds*, *Flannery* v. *SEC*, 810 F.3d 1 (1st Cir. 2015) 5, 15

TABLE OF AUTHORITIES—continued

Page

LEGISLATIVE HISTORY

S. 1551, 111th Cong. (2009) 23
Discussion Draft of Restoring American Financial Stability Act of 2009 (Nov. 10, 2009) 23
H.R. Rep. No. 107-414 (2002) 23
156 Cong. Rec. S3569 (daily ed. May 12, 2010) 23

SCHOLARLY AUTHORITY

Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & Bus. Rev. 273 (2016) 18

OTHER AUTHORITIES

Press Release, Cornerstone Research, Securities Class Action Filings Reach Record High for Second Straight Year (Jan. 30, 2018), https://www.cornerstone.com/Publications/Press-Releases/Securities-Class-Action-Filings-Reach-Record-High 24
Ctr. for Capital Mkts. et al., *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public* (2018), https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/IPO-Report_EXPANDING-THE-ON-RAMP.pdf 25
GAO-11-664, *Securities Fraud Liability of Secondary Actors* (July 21, 2011) 23

TABLE OF AUTHORITIES—continued

Page

Inst. for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* (Feb. 28, 2014), https://www.instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-us-securities-class-action-litigation 25

2 Wayne R. LaFave, *Substantive Criminal Law* (3d ed. 2017) 17

1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation (5th ed. 2013) 3

Ronald D. Orol, *Dodd Unveils Bank Reform Bill Without GOP Support*, MarketWatch, Nov. 10, 2009 23

Secs. Indus. & Fin. Mkts. Ass'n, http://www.sifma.org (last viewed Aug. 27, 2018) 1

Press Release, Rep. Maxine Waters, Waters Wins Big for Consumers, Homeowners, Minorities and Shareholders in Wall Street Reform and Consumer Protection Legislation (June 30, 2010) 23

INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of the industry's nearly 1 million employees, SIFMA advocates on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae*

---

[1] Pursuant to Rule 37.6, SIFMA and the Chamber confirm that no counsel for a party authored this brief in whole or in part and that no person other than SIFMA or the Chamber, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief, each in a separate writing filed concurrently with this brief.

briefs in cases such as this one that raise issues of concern to the nation's business community.

SIFMA and Chamber members and their directors, officers, and employees are often subjected to civil suits or Commission enforcement actions brought under Section 10(b) of the Exchange Act of 1934 and Rule 10b-5. Civil litigation brought in pursuit of damages, in particular, imposes enormous burdens, including disruption of business, litigation costs, and settlement expenses. Enforcement actions brought by the government add the prospect of sanctions that can end an individual's career or criminal penalties that can include incarceration. SIFMA and the Chamber, and the businesses and individuals whose interests they represent, thus have a keen interest in obtaining clear guidance regarding when Section 10(b) and Rule 10b-5 liability may attach.

SUMMARY OF THE ARGUMENT

In *Janus Capital Group, Inc.* v. *First Derivative Traders*, this Court held that one person *cannot* be "held liable . . . under Rule 10b-5 for false statements" made by another. 564 U.S. 135, 141 (2011). Now, just seven years later, the D.C. Circuit has held that petitioner Francis Lorenzo *can* be held liable for false statements made by another (Lorenzo's boss), reasoning that this contrary result is warranted because its decision rests on subsections (a) and (c) of Rule 10b-5, whereas *Janus* supposedly addressed only subsection (b) of that Rule.

This Court should reverse and make clear that there is no liability in these circumstances under Rule 10b-5 regardless of the subsection involved. "For purposes of Rule 10b-5," *as a whole*, "the maker of a statement is the person or entity with ultimate authority over the

statement, including its content and whether and how to communicate it." *Id.* at 142. That is the only answer consistent with the controlling statute—Section 10(b)—and with the Court's decisions construing that statute, including *Janus*.

I.A. The D.C. Circuit's key error was its myopic reliance on the language of *the regulation*, Rule 10b-5(a) and (c), to the exclusion of any meaningful analysis of whether Lorenzo's conduct violated *the statute*, Section 10(b). This Court's precedents instead command a statute-focused approach.

A "complaint states a cause of action under *any part of Rule 10b-5* only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute." *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 473–74 (1977) (emphasis added). However broad the language of Rule 10b-5, "its scope cannot exceed the power granted the Commission by Congress under § 10(b)." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976). That insight reverberates throughout the Court's Section 10(b) cases, several of which have refused to find liability in circumstances covered by the text of Rule 10b-5, but not Section 10(b). See *Ernst*, 425 U.S. at 212–14; *Aaron* v. *SEC*, 446 U.S. 680, 691 (1980); *Chiarella* v. *United States*, 445 U.S. 222, 225–26 (1980).[2]

---

[2] The Court's approach reflects in part the fact that Rule 10b-5 was released with only an afternoon's worth of thought and a single sentence of explanation. Indeed, the Commission essentially created the Rule by copying the language of a different statute (Section 17(a) of the 1933 Act) and pasting it into its regulation as an interpretation of Section 10(b). *See Ernst*, 425 U.S. at 212 n.32.; 1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation 9.B.3 (5th ed. 2013).

In light of Section 10(b)'s primacy, the Court's decisions have been careful to define the categories of conduct that violate Section 10(b)'s proscription of the "use or employ[ment] of "any manipulative or deceptive device" in connection with the purchase or sale of securities. See 15 U.S.C. § 78j(b). In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, the Court summarized those decisions, stating pointedly that the statute "prohibits *only* the *making* of a material misstatement (or omission) or the *commission* of a manipulative act." 511 U.S. 164, 175, 177–78 (1994) (emphases added). More recently, the Court's decision in *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 158 (2008), reiterated that Section 10(b) violations consist of "only misstatements, omissions by one who has a duty to disclose, and manipulative trading practices (where 'manipulative' is a term of art)" (citation omitted).

Seeking to create stable and predictable zones of liability, the Court has also carefully cabined the scope of each category of Section 10(b) violations. In *Santa Fe*, the Court confined "manipulation" to certain trading practices "that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476. With respect to the duty to disclose, the Court repeatedly has held that a non-speaking defendant (such as an inside trader) may violate Section 10(b) only by violating a duty of disclosure grounded in a relationship of trust and confidence. See, *e.g.*, *Dirks* v. *SEC*, 463 U.S. 646, 653–55, 657–59 (1983). Then, in *Janus*, the Court addressed the last category of Section 10(b) violations, clarifying that, in defining the prohibition on "the making of a material misstatement," *Cent. Bank*, 511 U.S. at 177, it would "not expand liability beyond the person or entity that ultimately has authority over a false statement." *Janus*, 564 U.S. at 144.

B. Reading the liability rule in *Janus* as applying to Section 10(b) is the only sensible way of reconciling this Court's longstanding precedents, in an area where clear, predictable rules and considerations of *stare decisis* are especially pronounced. The contrary rule sought by the Commission and embraced by the D.C. Circuit would dramatically blur long-settled lines between speaker and non-speaker liability under Section 10(b), and would "erase the line between primary violators and aiders and abettors established by *Central Bank*." *Janus*, 564 U.S. at 143, 147 & n.11.

It would also rob Rule 10b-5(b) of all meaning. In the Commission's view (which the D.C. Circuit adopted), "primary liability under Rule 10b-5(a) and (c) *also* encompasses the 'making' of a fraudulent misstatement to investors"—just like primary liability under Rule 10b-5(b). See *Matter of John P. Flannery & James D. Hopkins*, Release No. 3981, at *12 (Dec. 15, 2014), *rev'd on other grounds*, *Flannery* v. *SEC*, 810 F.3d 1 (1st Cir. 2015). This interpretation would reduce Rule 10b-5(b) to surplusage, even while *also* abrogating, in practical effect, the limitation on liability set out in *Janus*. That is no way to read a regulatory text, or an opinion of this Court for that matter.

C. The construction of Section 10(b) and Rule 10b-5 proposed by *amici*, in contrast, would respect the Court's Section 10(b) precedents and the structure of Rule 10b-5. It would also give due regard to the 1933 and 1934 Acts. These statutes contain numerous provisions that expressly impose liability—albeit in carefully circumscribed ways—for the same kind of secondary uses of misstatements that the D.C. Circuit held are implicitly prohibited by Rule 10b-5(a) and (c). These provisions reach those who "cause" or "control" the making of misstatements; "willfully participate[]" in certain misstatements; sell securities "by means of"

documents containing misstatements; or (of particular relevance here) "publish, give publicity to, or circulate"; or "disseminat[e]" certain misleading documents.

D. Finally, grounding *Janus* firmly in Section 10(b) would bring clarity and stability to the securities laws and therefore to the securities markets. Uncertain rules not only are unfair to public enforcement respondents like Lorenzo, they create fodder for abusive private suits. These suits make the country's public capital markets less attractive to entrepreneurs, which shifts investment towards private equity. A decision from this Court that reaffirms the clear and workable liability rule recognized in *Janus* would accordingly accrue to the benefit of the investing public.

II. In addition to reversing the Section 10(b) portion of the decision below, the Court should vacate and remand to the D.C. Circuit the Section 17(a)(1) charge. The D.C. Circuit treated Section 17(a)(1) as condemning the same behavior that Rule 10b-5(a) and (c) prohibit. But as demonstrated, Section 10(b), and thus Rule 10b-5, does not reach Lorenzo's conduct, and it is not clear what the D.C. Circuit would have held regarding Section 17(a)(1) had it separately analyzed that provision. Moreover, the courts of appeals have not significantly addressed Section 17(a)(1)'s proper scope, and because the Commission charged Lorenzo with employing an unlawful "device" or "artifice," but not an unlawful "scheme," this case does not present the Court with an opportunity to consider the full reach of Section 17(a)(1)—let alone the relationship of that provision to other provisions of Section 17. *Amici* respectfully submit, therefore, that the Court can and should decide this case without opining on whether Lorenzo violated Section 17(a)(1).

ARGUMENT

I. THE D.C. CIRCUIT ERRED BY FAILING TO INTERPRET RULE 10b-5 IN LIGHT OF ESTABLISHED LIMITATIONS ON SECTION 10(b) LIABILITY.

The D.C. Circuit erred when it ignored this Court's many decisions delimiting Section 10(b) and Rule 10b-5 as a whole. *Janus* followed from those decisions. The Court should confirm that the rule of *Janus*—including its approach to attribution, adoption, and dissemination—applies to any claim brought under Section 10(b) and Rule 10b-5 that is founded solely on an alleged misstatement. This rule would preserve the important distinction between primary and secondary violators and between potential liability for speaking and non-speaking defendants, give proper effect to other provisions of the securities laws, and protect the nation's public capital markets against the threat of unwarranted private and public enforcement actions.

A. Section 10(b) Governs The Scope Of Liability Under Rule 10b-5 And Proscribes Only Certain Well-Defined Conduct.

1. The Court long ago held that Rule 10b-5 does not reach any conduct outside the four corners of the Rule's authorizing statute, Section 10(b) of the 1934 Act. In *Ernst*, the Commission claimed authority to prosecute negligent behavior under Rule 10b-5, arguing that the broad language of Rule 10b-5(b) and (c) "standing alone could encompass . . . negligent behavior." 425 U.S. at 212. The Court agreed that the Rule's language alone "could be read as proscribing . . . any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not." *Id.*

The Court, however, rejected the Commission's invitation to read the regulation in isolation. It held that, "despite the broad view of [Rule 10b-5] advanced by the Commission," the Rule's "scope cannot exceed the power granted the Commission by Congress under [Section] 10(b)." *Id.* at 214. This holding followed from basic tenets of administrative law: the "rulemaking power granted to an administrative agency . . . is not the power to make law." *Id.* at 213. An agency only has "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Id.* at 214 (quoting *Dixon* v. *United States*, 381 U.S. 68, 74 (1965)).

After holding that Section 10(b) demarcated the potential reach of Rule 10b-5, the Court determined that the Commission's reading of Rule 10b-5 exceeded those bounds. Drawing from Section 10(b)'s reference to "manipulation and deception, and of implementing devices and contrivances," *id.* at 214, the Court held that Rule 10b-5 could not be construed to reach negligent conduct—even if the language of the Rule itself went that far. *Id.*

Despite the Court's reliance in *Ernst* on the statutory text, the Commission tried to limit *Ernst* to the judicially implied private right of action. In *Aaron* v. *SEC*, the Commission argued that the rule adopted in *Ernst* applied only to private Rule 10b-5 suits, not to injunctive actions brought by the Commission. 446 U.S. at 689. The Court rejected this attempt to artificially limit *Ernst*'s reading of the statute, and squarely held that regardless whether an action is brought by a private plaintiff or the Commission, "the language of § 10(b)" controls the scope of liability under Rule 10b-5. *Id.* at 694–95.

2. Having established the primacy of Section 10(b), the Court has since delineated the conduct the statute prohibits. Section 10(b) only prohibits the "use" or "employ[ment]" of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). The Court has homed in on the statute's "deceptive" or "manipulative" qualifiers, holding that a "complaint states a cause of action under *any part of Rule 10b-5* only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute." *Santa Fe*, 430 U.S. at 473–74 (emphasis added).

In *Santa Fe*, a parent company had relied on a Delaware corporate law provision permitting the company to buy out minority shareholders in exchange for cash. *Id.* at 465–68. The plaintiffs attempted to assert liability based on the broad language of Rule 10b-5(a) and (c), alleging that the defendants had engaged in a "device, scheme, or artifice to defraud," through a "gross undervaluation" of the plaintiffs' shares, in breach of their fiduciary duty to the plaintiffs. *Id.* at 467–68.

The Court disagreed. The Court first noted that the defendants had not engaged in any "deceptive" act under Section 10(b) since the plaintiffs did not allege a "material misrepresentation or material failure to disclose." *Id.* at 474. That the defendants allegedly had breached their fiduciary duty was not enough—absent a misstatement by the defendants, the defendants' conduct, however inappropriate or distasteful, did not constitute the "deception" that Section 10(b) prohibits. *Id.* at 474–75. As to manipulation, the Court held it "readily apparent" that the defendants' actions were "not 'manipulative' within the meaning of the statute." *Id.* at 476. As the Court explained, "'[m]anipulation' is

'virtually a term of art when used in connection with securities markets.'" *Id.* (quoting *Ernst*, 425 U.S. at 199). "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.*

A few years later, the Court returned to the scope of "deceptive," as that term is used in Section 10(b). In *Chiarella* v. *United States*, the defendant was charged with a criminal violation of Section 10(b), on the theory that he had unfairly traded on material non-public information. 445 U.S. at 224–25. The jury instruction tracked the broad language of Rule 10b-5 subsections (a) and (c): the jury could convict the defendant if it found that he "employed a device, scheme, or artifice to defraud" or "engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person." *Id.* at 236.[3]

This Court reversed. It held that the defendant did not do anything "deceptive" within the meaning of Section 10(b) because "there can be no fraud absent a duty to speak," and on the facts before the Court, the defendant had no such specific duty. *Id.* at 235. In so ruling, the Court also rejected the Second Circuit's suggestion that *anyone* possessing superior market information has a "general duty" running to "all participants in market transactions," *Chiarella*, 445 U.S. at 233, to disclose that information (or refrain from trading on it) regardless of any pre-existing relationship. See *United States* v. *Chiarella*, 588 F.2d 1358, 1364–

---

[3] The government's indictment also invoked the misstatement language of Rule 10b-5(b). However, that portion of its indictment was dismissed since Chiarella had not made any affirmative statement. *Chiarella*, 445 U.S. at 225 n.5.

66 (2d Cir. 1978). The Court found no basis in the statute to support such a sweeping duty and cautioned that, "[a]s we have emphasized before, the 1934 Act cannot be read 'more broadly than its language and the statutory scheme reasonably permit.' . . . Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella*, 445 U.S. at 234–35 (quoting *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 116 (1978)).[4]

The Court affirmed and restated all of these holdings in its 1994 *Central Bank* decision: "As in earlier cases considering conduct prohibited by § 10(b), *we again conclude that the statute prohibits only the making of a material misstatement (or omission)*," which can include a non-disclosure coupled with a duty to speak, "*or the commission of a manipulative act.*" 511 U.S. at 177–78 (emphases added). The Court then restated the same framework in its 2008 *Stoneridge* decision, confirming that Section 10(b) violations consist of "only

---

[4] The Court relied both on its prior common law and Section 10(b) precedents and on the Commission's own *Cady, Roberts* decision to conclude that "such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Chiarella*, 445 U.S. 226–30 (citing *Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 911–13 (Nov. 8, 1961)). The Court, moreover, has since repeatedly adhered to *Chiarella*'s duty framework to define deceptive conduct under Section 10(b). *See, e.g., United States* v. *O'Hagan*, 521 U.S. 642, 654–55 (1997) ("Because the deception . . . involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation"); *SEC* v. *Zandford*, 535 U.S. 813, 821–23, 825 n.4 (2002) (broker's Rule 10b-5(a) and (c) liability for misappropriating assets derived from failure to make disclosure required by fiduciary duty arising from discretion over client investments); *see also Salman* v. *United States*, 137 S. Ct. 420, 423 (2016); *Dirks*, 463 U.S. at 653–55, 657–59.

misstatements, omissions by one who has a duty to disclose, and manipulative trading practices (where 'manipulative' is a term of art)." 552 U.S. at 158 (citation omitted).

To be sure, there can be liability under Section 10(b) *without* an "oral or written statement" because "[c]onduct itself can be deceptive." *Id.* But this only underscores rather than amends the rule laid out in this Court's precedents. "Deception" consists of misstatements (including misstatements conveyed through conduct rather than words), or the failure to disclose in light of a clearly established duty to do so. "Manipulation" consists of a defined set of conduct, as explained in *Santa Fe*. Those are the only bases for liability covered by Section 10(b), and thus the only bases that any provision of Rule 10b-5 can properly reach.

3. In light of this long tradition, the Court's *Janus* decision is properly understood as a case that refined the meaning of "deceptive" under Section 10(b) by addressing what it means to commit a "deceptive" act through "the making of a material misstatement or omission." *Cent. Bank*, 511 U.S. at 177.

In *Janus*, the Court began by stating the question presented in holistic terms, asking whether "a mutual fund investment adviser, can be held liable in a private action under Securities and Exchange Commission (SEC) *Rule 10b-5* for false statements included in its client mutual funds' prospectuses." 564 U.S. at 137 (emphasis added); see also *id.* at 141 (case concerned liability "under Rule 10b-5 for false statements"). The Court also emphasized that the Commission "promulgated Rule 10b-5 pursuant to authority granted under § 10(b) of the Securities Exchange Act of 1934." *Id.* at 141.

Of course, the Court also placed significant weight on the specific language of Rule 10b-5(b), *id.* at 142. But it would be a mistake to read *Janus* (as the Commission and D.C. Circuit have), as a decision addressed *solely* to misstatements liability under Rule 10b-5(b), and not to misstatements liability under Section 10(b) and Rule 10b-5 as a whole.

In fact, the Court was careful to note that the "rule" it announced "follow[ed] from" its decisions interpreting Section 10(b) and Rule 10b-5 such as *Central Bank*, *id.* at 143, and described that "rule" as applying "for purposes of Rule 10b-5"—not just subsection (b) of Rule 10b-5. *Id.* at 142, 148 & n.12. Moreover, the Court pointed out that this was "not the first time" it had "disagreed with the SEC's broad view of § 10(b) or Rule 10b–5" and cited *Central Bank*, *Dirks*, and *Ernst*, among other leading Section 10(b) precedents. *Id.* at 145 n.8. Finally, the Court twice noted that a broader reading would effectively expand primary liability to encompass aiders and abettors, contrary to *Central Bank* and *Stoneridge*. *Id.* at 143, 145. The Court's "rule" should thus be taken at face value as an interpretation of both Section 10(b) and Rule 10b-5. "[T]he maker of a statement is the entity [or person] with authority over the content of the statement and whether and how to communicate it." *Id.* at 144. No one other than a "maker" may be subjected to primary liability under Section 10(b) and Rule 10b-5 on the theory that the statement was materially false or misleading.

That conclusion is buttressed by *Janus*'s explicit holding that merely acting as a conduit in disseminating the statements of others is "not a basis for liability." *Id.* at 147–48 & nn.11–12 (rejecting argument that distributing a prospectus by hosting it on a company website gives rise to liability). The Court further explained that Rule 10b-5 does not impose liability for

making a statement "indirectly" unless the statement was "attributed, explicitly or implicitly, to" the defendant: "[m]ore may be required . . . but attribution is necessary." *Id.* at 147 n.11.

At the petition stage, the Commission obliquely referenced this aspect of *Janus* by arguing that the defendant in that case, unlike Lorenzo, "played no *active* role in disseminating the misstatements." BIO 14–15 (emphasis added). See also Pet. App. 21, 24–25. But the *Janus* standard does not turn on the role that a person or entity may play with respect to dissemination. To the contrary, *Janus* made clear that "[m]erely hosting a document on a Web site *does not* indicate that the hosting entity adopts the document as its own statement or exercises control over its content." 564 U.S. at 148 n.12 (emphasis added).

That one does not become civilly or criminally liable under Section 10(b) merely by playing some role in the dissemination of a statement is critical to *amici* and to the businesses and individuals whose interests they represent. Securities industry professionals, in particular, distribute the statements of others to their clients by many different channels and involving varying degrees of directness, including public and private websites, individual and mass emails, and the mailing or physical distribution of prospectuses. *Janus* clarified that they do not accept exposure to Section 10(b) or Rule 10b-5 liability each time they do so.

The *Janus* standard thus offers clear guidance, consistent with this Court's precedents, for when such activities require securities industry professionals to take responsibility for the contents of documents that they disseminate. That is a crucial consideration in an "'an area that demands certainty and predictability,'" *Cent. Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*,

486 U.S. 622, 652 (1988)), and in which this Court has previously rejected tests that are "complex in formulation and unpredictable in application." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 256 (2010). Neither the Commission nor the D.C. Circuit considered whether the tests they adopted would promote the certainty and predictability across cases that this Court has properly recognized as vital to the proper operation of the securities markets. *Amici* urge this Court to preserve and reaffirm the clear and consistent *Janus* rule.[5]

B. The D.C. Circuit's Approach Would Undermine Section 10(b)'s Limitations On Rule 10b-5 Liability.

1. The D.C. Circuit and the Commission gave far too little consideration to this Court's prior Section 10(b) decisions and to *Janus*'s place within that line of decisions. Indeed, in a 2014 opinion, the Commission went so far as to suggest that the Court had not defined "the meaning of 'deceptive'" devices or contrivances under Section 10(b). *Flannery*, Release No. 3981, at *12 & n.52. To the contrary, this Court's decisions set forth

---

[5] The D.C. Circuit appeared to mix and match standards with its observation that Lorenzo had "effectively vouched for the emails' contents," which it described as "self-attributed communications sent directly to investors." Pet. App. 25. But it is apparently undisputed at this stage, as reflected in the question presented in both the Petition and the Commission's Opposition, that the D.C. Circuit correctly held that Lorenzo did not violate Rule 10b-5(b) under *Janus*. Pet. App. 15–19. Vouching or self-attribution were not the bases on which the Commission had found Rule 10b-5(a) or (c) liability. Pet. App. 77. Nor is the D.C. Circuit's offhand formulation consistent with the approach to attribution or adoption taken in *Janus*, which should be the proper analytical framework.

above have amply defined and delimited the "deceptive" conduct that Section 10(b) prohibits, and that Rule 10b-5 properly can reach.

Santa Fe and *Chiarella*—the Court's decisions interpreting Section 10(b)'s proscription of "deceptive" devices—make clear that Section 10(b) only reaches misstatements consisting of a "material misrepresentation or material failure to disclose" (in light of a duty to do so). *Santa Fe*, 430 U.S. at 474; *Chiarella*, 445 U.S. at 236. *Janus* clarified these earlier decisions, holding that misstatement liability attaches only to those responsible for its content.

It was thus error for the D.C. Circuit to say that involvement with a misstatement violates Rule 10b-5(a) and (c), based solely on the observation (accurate, so far as it goes) that those subsections are stated in broad terms. As discussed above, the primary question under this Court's Section 10(b) cases is whether the charged conduct violates *the statute*. Once the D.C. Circuit determined that Lorenzo did not "make" the false statements that formed the basis for the Commission's charges, that should have been the end of the inquiry, absent an allegation that Lorenzo violated Section 10(b) in another way recognized by the Court's case law (*i.e.*, by remaining silent where he had a duty to speak, or by engaging in "manipulation," within the meaning of that term of art). Because no other such basis for liability under Section 10(b) was found, the conclusion that Lorenzo did not "make" the charged misstatements means that he did not violate Section 10(b) or Rule 10b-5.

2. The D.C. Circuit also went wrong in attempting to downplay the conflict between its conclusion and a key animating rationale of the Court's decisions in *Janus* and *Central Bank*—to hold the Rule 10b-5 private right of action within properly "narrow dimensions."

Janus, 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167).

In *Central Bank*, the Court held that "Rule 10b–5's private right of action does not include suits against aiders and abettors." *Id.* at 143. Following *Central Bank*, Congress amended the law to allow aiding and abetting claims to be brought, but only by the Commission, 15 U.S.C. § 78t(e), leaving that side door firmly shut to private litigants. That legislative choice has informed the Court's reasoning in subsequent Section 10(b) cases. In *Stoneridge*, the Court rejected the petitioner's "view of primary liability," since it would have made "any aider and abettor liable under § 10(b) if he or she committed a deceptive act in the process of providing assistance." 552 U.S. at 162. And in *Janus*, the Court reasoned that "[a] broader reading of 'make,' including persons or entities without ultimate control over the content of a statement, would substantially undermine *Central Bank*. If persons or entities without control over the content of a statement could be considered primary violators who 'made' the statement, then aiders and abettors would be almost nonexistent." 564 U.S. at 143.

The D.C. Circuit suggested that its holding could be squared with *Janus* because "Lorenzo himself communicated with investors" and "his involvement was transparent to them." Pet. App. 24–25. The flaw in that rationale should be apparent: aiders and abettors may act visibly, and often do, as this Court's Section 10(b) cases well illustrate. The investment adviser in *Janus* and the indenture trustee in *Central Bank* both had investor-facing roles that were visible to the plaintiffs in those cases. More broadly, conduct that qualifies as aiding and abetting is very often "transparent"—driving the getaway car is a quintessential example. See 2 Wayne R. LaFave, *Substantive Criminal*

Law § 13.2(a) (3d ed. 2017). And nothing in *Janus* or *Central Bank* or recent congressional enactments provides any ground for suggesting, as the D.C. Circuit did, that *some* aiders and abettors (the "visible" ones) may be treated as primary violators of Section 10(b).

Judge Kavanaugh put his finger on another aspect of this key issue in his dissenting opinion below. "For decades [] the SEC has tried to erase" the distinction between primary and secondary liability this Court has worked hard to maintain. Pet. App. 46–47; see also Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & Bus. Rev. 273, 275 (2016) ("much of *Flannery* is not consistent with, and is antagonistic to, a series of prominent Supreme Court decisions that imposed meaningful boundaries around aspects of primary liability under Rule 10b-5"). The court of appeals should not have countenanced the Commission's latest effort, and this Court certainly should not. It should instead hold that neither the Commission nor private litigants can evade the rule of *Janus* by relabeling misstatement claims as violations of Rule 10b-5 subsections (a) and (c). A person may not be subject to liability for a misstatement unless the misstatement is attributable to that person—merely sending an email, hosting a webpage, or otherwise being part of the chain of events that leads to the statement's distribution is not enough. To be liable under Section 10(b) and Rule 10b-5, the person must "make" the statement personally or clearly adopt it as his or her own.

3. The D.C. Circuit's holding also fails to make sense of the language and structure of Rule 10b-5 as a whole. Unlike subsection (b), neither subsections (a) nor (c) uses the word "statement." See 17 C.F.R. § 240.10b-5. Instead, subsection (a) speaks of "any device, scheme,

or artifice" and subsection (c) speaks of "any act, practice, or course of business." *Id.* These words do not connote speaking, writing, or otherwise communicating, and are hardly synonymous with making a "statement." Especially when they are juxtaposed onto subsection (b)'s express focus on "statement[s]," they are best read to be referring to conduct *other than* statements. Indeed, if subsection (a) and (c) embody all misstatement cases, then subsection (b) has no purpose or meaning at all—a result at odds with the established principle that courts should not read "text in a way that makes part of it redundant." See *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 669 (2007).

By contrast, applying *Janus* to all Section 10(b) claims would leave plenty of work for Rules 10b-5(a) and (c). As noted above, while Rule 10b-5(b) addresses statements, it does not address omissions (except those that render a statement misleading), or market manipulation, or insider trading—all of which are Rule 10b-5(a) and (c) violations routinely charged by the Commission.

C. The D.C. Circuit's Interpretation Fails To Take Account Of Other Securities Law Provisions That Expressly Address Misuses Of Statements.

Applying the *Janus* rule to all misstatement cases under Section 10(b) would help give effect to Congress's careful allocation of responsibilities and liability across the securities laws. In particular, the Commission's effort to extend primary liability for merely assisting in the dissemination or circulation of a statement made by another runs up against the fact that Congress knew how to create liability for precisely that type of conduct, and expressly did so elsewhere in the 1933 and 1934 Acts.

Section 9(a)(5) of the 1934 Act. To take one prime example, Section 9(a)(5) of the 1934 Act makes it unlawful for anyone receiving consideration from certain market actors (such as selling broker-dealers) "to induce the purchase of any security . . . *by the circulation or dissemination of information* to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons" for that purpose. 15 U.S.C. § 78i(a)(5) (emphasis added). For another, Section 17(b) of the 1933 Act makes it unlawful in certain circumstances "to *publish, give publicity to, or circulate* any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security." *Id.* § 77q(b) (emphasis added).

More broadly, multiple provisions of the 1933 and 1934 Acts provide various avenues for liability for secondary involvement in statements, but subject to restrictions that do not apply to Section 10(b). These include Sections 9 and 18 of the 1934 Act, both of which this Court has long seen as "close in structure, purpose, and intent to the 10b-5 action," *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 295 (1993), and both of which "target the precise dangers that are the focus of § 10(b)," *id.* at 296 (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 (1991)).

Section 9(f) of the 1934 Act. Section 9(f) of the 1934 Act, 15 U.S.C. § 78i(f), reaches beyond defendants who use or employ the specified unlawful devices. Sections 9(a)–(c) prohibit certain enumerated forms of market manipulation, *id.* § 78i(a)–(c), Section 9(a)(4) prohibits false or misleading statements by a dealer, broker, "or other person selling or offering [a security]

for sale" made "for the purpose of inducing the purchase or sale" of that security, *id.* § 78i(a)(4), and as noted above, Section 9(a)(5) prohibits circulating or disseminating certain information, *id.* § 78i(a)(5). Unlike Section 10(b), Section 9(f) creates additional express private civil liability for "[a]ny person who *willfully participates in* any act or transaction" prohibited by Sections 9(a)–(c). *Id.* § 78i(f) (emphasis added). As this Court has held, Section 9(f) shows that "Congress knew of the collateral participation concept," and thus that the concept should not be implied into other civil-liability provisions. *Pinter*, 486 U.S. at 650 n.26.

Section 18(a) of the 1934 Act. Section 18(a) imposes liability on any defendant who "shall make *or cause to be made*" a statement that is "false or misleading with respect to any material fact" in "any application, report or document filed" pursuant to the 1934 Act. 15 U.S.C. § 78r(a) (emphasis added). In Section 10(b), by contrast, Congress did not prohibit the "causing" of a deceptive device, but instead stopped at the defendant who actually "use[s] or employ[s]" the deceptive device in connection with a purchase or sale of securities.

Section 20(a) of the 1934 Act and § 15 of the 1933 Act. In Sections 20(a) of the 1934 Act, 15 U.S.C. § 78t(a), and Section 15(a) of the 1933 Act, 15 U.S.C. § 77o(a), Congress authorized liability against "control persons." These two statutes make a person who "controls" another liable "to the same extent" as the "controlled person." *Id.* §§ 77o(a), 78t(a). By reaching control persons, these statutes, "in marked contrast to the implied [Section] 10 remedy . . . impose derivative liability." *Musick, Peeler*, 508 U.S. at 296. There is no need to stretch Section 10(b) and Rule 10b-5 to do work that Congress has already done elsewhere and with greater precision.

Sections 11 and 12 of the 1933 Act. Section 11 of the 1933 Act creates a claim only against enumerated defendants for misrepresentations or omissions in a registration statement for an offering of new securities. See 15 U.S.C. § 77k(a). This list includes directors of the issuer, underwriters, and those who sign or consent to be named in a registration statement. *Id.* Section 12(a)(1) and (a)(2) claims are directed against anyone who "[o]ffers or sells a security . . . *by means of* a prospectus or oral communication" that is false or misleading, or in violation of registration requirements, and may be brought only by "the person purchasing such security from him." *Id.* § 77*l*(a)(1)–(2) (emphasis added). The class of defendants is limited to those in privity with the plaintiff or who directly solicit the plaintiff's purchase at least in part for their own financial gain. This Court rejected extending Section 12 liability further to someone "whose participation in the buy-sell [securities] transaction is a substantial factor in causing the transaction to take place." *Pinter*, 486 U.S. at 649–50; see *Cent. Bank*, 511 U.S. at 174–75, 179. Neither Section 11 nor Section 12 is enforceable by the Commission.

The PSLRA. In enacting the Private Securities Litigation Reform Act (PSLRA), Congress rejected proposals to overrule *Central Bank* and expand the scope of private civil liability under Section 10(b) to secondary actors. Instead, by enacting Section 20(e) of the 1934 Act, 15 U.S.C. § 78t(e), Congress expressly provided that aiders and abettors may be pursued in actions brought by the Commission. Thus, Congress gave the Commission, but *not* private plaintiffs, an express claim for conduct ("substantial assistance") by those who did not commit a primary violation of Section 10(b)—and required the Commission to pursue them as aiders and abettors, not primary violators.

More Recent Legislation. In considering the 2002 Sarbanes-Oxley Act, Congress again rejected proposals to allow private civil plaintiffs to sue secondary actors under Section 10(b). Specifically, the proposal was to give "the victims of fraud the right to sue those who aid issuers in misleading and defrauding the public." H.R. Rep. No. 107-414, at 53–54 (2002). That effort was rejected.

In the 2010 Dodd-Frank Act, Congress once more rejected similar provisions that were included in the original Senate version of the bill, in a stand-alone bill proposed in the Senate, and in a conference amendment proposed in the House. See S. 1551, 111th Cong. (2009); 156 Cong. Rec. S3569, S3618 (daily ed. May 12, 2010) (statement of Sen. Specter regarding Amendment No. 3776); *Discussion Draft of Restoring American Financial Stability Act of 2009* § 984 (Nov. 10, 2009); Ronald D. Orol, *Dodd Unveils Bank Reform Bill Without GOP Support*, MarketWatch, Nov. 10, 2009; Press Release, Rep. Maxine Waters, Waters Wins Big for Consumers, Homeowners, Minorities and Shareholders in Wall Street Reform and Consumer Protection Legislation (June 30, 2010). Instead, Congress expanded the Commission's authority to pursue and sanction aiders and abettors, see Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, § 929M 124 Stat. 1376, 1861–62 (2010), and ordered a GAO study of private aiding and abetting claims, see *id.* at, § 929Z 124 Stat. at 1871. The study, issued after *Janus*, noted the competing policy considerations and produced no recommendations. See GAO-11-664, *Securities Fraud Liability of Secondary Actors* (July 21, 2011).

These legislative decisions make "unsupportable" a reading of Section 10(b) and Rule 10b-5 that would transform a large number of aiders and abettors into

primary violators. See *Stoneridge*, 552 U.S. at 162. And yet the D.C. Circuit held that at least those aiders and abettors whose involvement with actionable misstatements "was not 'undisclosed' to investors" may be treated as primary violators. Pet. App. 24.

D. The D.C. Circuit's Interpretation Will Harm The Securities Markets.

Ratifying the bright-line "attribution is necessary" rule adopted in *Janus*, 564 U.S. at 147 n.11, would bring much-needed certainty to the securities laws and therefore to the securities markets. The Court has repeatedly stressed the need for unambiguous, readily administrable rules to govern and constrain securities-fraud litigation. Without these rules, the Court has admonished, private lawsuits can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). "[P]laintiffs with weak claims [can] extort settlements" from "innocent" companies that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a lawsuit." *Stoneridge*, 552 U.S. at 163; see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 80–81 (2006).

These are not hypothetical concerns. In 2017, the number of federal securities class actions reached a record high—leapfrogging the previous record set in 2016. Press Release, Cornerstone Research, Securities Class Action Filings Reach Record High for Second Straight Year (Jan. 30, 2018), https://www.cornerstone.com/Publications/Press-Releases/Securities-Class-Action-Filings-Reach-Record-High. Although these suits are purportedly brought on behalf of shareholders, it is at least ironic that it is the shareholders who typically come out on the losing end of this phenome-

non. Since Congress enacted the PSLRA in 1995, securities class actions have wiped out over $701 billion in investment value and given shareholders only $90 billion. Inst. for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* (Feb. 28, 2014), https://www.instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-us-securities-class-action-litigation.

The direct cost of shareholder class actions, large as it is, is dwarfed by the indirect cost to the country's litigation-attracting public markets. Both SIFMA and the Chamber were involved in a recently issued report detailing the decline of public companies among American businesses. Ctr. for Capital Mkts. et al., *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public* (2018), https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/04/IPO-Report_EXPANDING-THE-ON-RAMP.pdf. The sad fact is that fewer entrepreneurs are taking their companies public today, and when they do, they tend to do so later in their company's life cycle. At the same time, public companies increasingly are going private in part to avoid the litigation risks. The threat of abusive Section 10(b) and Rule 10b-5 litigation is one deterrent to going (and staying) public. That deterrent is largely grounded in a cause of action this Court created—the Court must ensure it remains appropriately narrow.

Of course, this is an action by the Commission, not a private suit. But this does not make the need for clarity any less acute. The Court's decisions delimiting categories of liability under Section 10(b) and Rule 10b-5 do not distinguish between Commission enforcement actions and civil suits. What the Court decides in this case will apply equally to suits brought by private plaintiffs. And in any event, clarity about scope of the

government's enforcement powers serves important ends as well. The investing public, regulated businesses, and the government officials charged with the prudent and lawful exercise of the powers conferred by the securities laws all stand to benefit from a decision that brings clarity by rejecting the Commission's effort to end-run *Janus* and undermine the well-defined liability rule established by that decision. See *Chiarella*, 445 U.S. at 235 n.20 ("a judicial holding that certain undefined activities 'generally are prohibited' by § 10(b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity."); *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) (agencies must give a "person of ordinary intelligence fair notice of what is prohibited" (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008))).

II. THE D.C. CIRCUIT FAILED TO SEPARATELY DETERMINE WHETHER LORENZO COMMITTED A PUNISHABLE VIOLATION OF SECTION 17(a)(1).

Lorenzo also was held liable for violating Section 17(a)(1) of the Securities Act of 1933. Pet. App. 22, 77, 110. This Court should vacate this determination and remand to the D.C. Circuit for further proceedings for three reasons.

First, the D.C. Circuit's decision devoted little independent analysis to text, context, or history of Section 17(a)(1). Pet. App. 20–22; see also *id.* at 77 (Commission decision). The D.C. Circuit concluded that Lorenzo had violated Rule 10b-5(a) and (c), treated Section 17(a)(1) as a fellow traveler to those regulatory provisions, and thus concluded that Lorenzo must have violated Section 17(a)(1). For reasons shown above, however, the D.C. Circuit erred in concluding that Lorenzo violated Section 10(b) and Rule 10b-5,

and it is unclear from the lower court's opinion whether it would have sustained the Commission's finding that Lorenzo violated Section 17(a)(1) absent that error. Indeed, the D.C. Circuit never articulated any specific view of what conduct that statutory provision covers, stating only, at a high level, that Section 17(a)(1) "readily encompasses Lorenzo's actions." Pet. App. 22; see also *id.* at 33 ("Lorenzo's particular conduct . . . fits comfortably within the language of . . . Section[] . . . 17(a)(1)."). But of course, the D.C. Circuit made exactly the same observation—erroneously—about Rule 10b-5(a) and (c).

To be sure, the D.C. Circuit's treatment of Section 17(a)(1) as more or less equivalent to Rule 10b-5(a) and (c) is broadly consistent with the path taken by other lower courts. See, *e.g.*, *SEC* v. *Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) ("Essentially the same elements are required under Section 17(a)(1)–(3) in connection with the offer or sale of a security" as under Rule 10b-5."); *Landry* v. *All Am. Assurance Co.*, 688 F.2d 381, 386 (5th Cir. 1982). The lower courts have treated Section 17(a) and Rule 10b-5 similarly because the language of the two provisions is similar. In fact, the Rule's language was likely "derived in significant part" from Section 17(a). *Ernst*, 425 U.S. at 213 n.32.

But while the language is similar, it is not identical. For instance, Section 17(a) as a whole applies "*in* the offer or sale" of securities, 15 U.S.C. § 77q(a), whereas Section 10(b)'s applies to conduct "in connection with" covered transactions, *id.* § 78j(b). *Cf. United States* v. *Naftalin*, 441 U.S. 768, 773 n.4 (1979) (noting possible distinction between "in" and "in connection with"). Moreover, Section 17(a), unlike Rule 10b-5, is not governed by the limitations imposed by Section 10(b)'s "manipulative or "deceptive" language.

In part because of these differences—and in contrast to the D.C. Circuit's casual parallel construction—this Court has in the past interpreted Section 17(a) and Rule 10b-5 differently. For instance, the Court in *Aaron* concluded that a lesser state of mind was required by Sections 17(a)(2) and 17(a)(3) than by Rules 10b-5(b) and (c). See *Aaron*, 446 U.S. at 695–97. And the plaintiffs in *Santa Fe* argued that their broad reading of Rules 10b-5(a) and (c) was supported by the parallel text of Section 17(a)(1) and 17(a)(3). See Respondents' Brief at *9–15, *Santa Fe Indus., Inc.* v. *Green*, No. 75-1753, 1976 WL 181700 (U.S. Dec. 17, 1976). The Court, however, declined to tie Section 17(a)(1) and (a)(3) to Rule 10b-5 and resolved the case solely on the basis of Section 10(b).

In short, the Court has already held that Section 10(b) and Section 17(a) are not coterminous at least as regards the required mental state, and there are good reasons to think they may diverge in other ways as well. The Court accordingly should not adopt the D.C. Circuit's assumption that Section 17(a)(1) prohibits exactly the same sweep of conduct as Section 10(b) and Rule 10b-5(a) and (c).

Second, the posture of this case provides an additional reason for this Court to defer consideration of Section 17(a)(1), and in particular how it interacts with Sections 17(a)(2) and 17(a)(3). Section 17(a)(1) prohibits employing a "scheme" to defraud (a term found in Rule 10b-5(a) but not in Section 10(b)), but the Commission found only that "Lorenzo's role in producing and sending the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability under Section 10(b), Rule 10b-5(a) and (c), and Section 17(a)(1)"—pointedly omitting any reference to a "scheme." Pet. App. 77. The D.C. Circuit

did the same. *Id.* at 34 (Lorenzo "'engaged' in a fraudulent 'act' and 'employed' a fraudulent 'device' when, with knowledge of the statements' falsity and an intent to deceive, he sent the statements to potential investors carrying his stamp of approval as investment banking director."). At least one court of appeals has observed that a fraudulent scheme under Section 17(a)(1) may require "conduct beyond just misrepresentations or omissions" and thus set a higher bar than a Rule 10b-5(b) violation. *SEC* v. *Quan*, 817 F.3d 583, 589 (8th Cir. 2016) (quoting jury instructions). Given the absence of any fraudulent scheme finding in the record, this case does not present the Court with the opportunity to address the coverage of Section 17(a)(1) as a whole. A decision that implicates this critical provision without addressing its full contours would likely generate more heat than light and is in any event premature.

Third, as the Commission argued in opposition to Lorenzo's Petition, there is no substantial or developed Circuit split on the interpretation of Section 17(a)(1). BIO 17–18. Section 17(a) has in general received far less attention over the years than Section 10(b) and Rule 10b-5. Accordingly, the better course for this Court to follow is to remand to the D.C. Circuit for further proceedings regarding the Commission's Section 17(a)(1) charge. If the issue here is a recurring one, which is not clear, the Court can address Section 17(a) more fully in a later case.

CONCLUSION

For the foregoing reasons, the Court should vacate the D.C. Circuit's judgment and remand to that court for further proceedings with respect to Section 17(a)(1).

Respectfully submitted,

DANIEL A. MCLAUGHLIN
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

CARTER G. PHILLIPS
KWAKU A. AKOWUAH*
KURT A. JOHNSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
kakowuah@sidley.com

Counsel for Amici Curiae

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae *Chamber of Commerce of the United States of America*

IRA D. HAMMERMAN
KEVIN CARROLL
SECURITIES INDUSTRY & FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7382

Counsel for Amicus Curiae *Securities Industry & Financial Markets Association*

August 27, 2018

* Counsel of Record